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10/751,362

01/05/2004

Radhakrishnan Janardanan Nair

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THE PROCTER & GAMBLE COMPANY  
Global Legal Department - IP  
Sycamore Building - 4th Floor  
299 East Sixth Street  
CINCINNATI, OH 45202

EXAMINER

CHAPMAN, GINGER T

ART UNIT

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PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/751,362	<b>Applicant(s)</b> NAIR ET AL.	
	<b>Examiner</b> Ginger T. Chapman	<b>Art Unit</b> 3761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 08 July 2010.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1,9,11,22-30 and 32-34 is/are pending in the application.
- 4a) Of the above claim(s) 25-29 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,9,22-24,30 and 32-34 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 08 July 2010 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |   |   |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)         | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)         | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____   | 6) <input type="checkbox"/> Other: _____                          |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 08 July 2010 has been entered.

### ***Status of the Claims***

2. Claims 1, 30 and 33-34 are amended, claims 1, 9, 11, 22-30 and 32-34 are pending in the application, claims 25-29 are withdrawn from consideration as being drawn to a nonelected invention, claims 1, 9, 22-24, 30 and 32-34 are examined on the merits.

### **Withdrawn objections:**

3. The objection to the drawings for failing to show every feature of the invention specified in the claims, made of record in the previous Office action, is withdrawn in view of Applicants' amendment to the drawings.

### **Withdrawn rejections:**

4. The rejection of claims 1 and 30 for failing to comply with the written description requirement, made of record in the previous Office action, is withdrawn in view of Applicants' amendment to the claims.

### ***Claim Rejections - 35 USC § 103***

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

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(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35

U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

7. Claims 1, 9, 11, 22-24 and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brandon et al (US 5,818,719) in view of Yeo et al (US 5,503,076) and further in view of Pargass et al (US 6,558,499 B1).

8. **With respect to claims 1 and 30**, as best depicted in Figure 3, Brandon discloses an absorbent product 10 comprising: a topsheet 36, a backsheet 34, and an absorbent core 32 disposed between the topsheet and the backsheet, the topsheet and the backsheet defining a first waist region (fig. 2A) longitudinally opposed to a second waist region (fig. 2A), wherein the first and second waist regions are connectable with each other to form a waist opening 22 (figs. 1 and 2), each of the absorbent articles further comprising a visible framing mark 74 and a printed graphic 38 (column 10, lines 42-53) 42 (column 7, line 65 to column 8, line 5) printed directly on the backsheet (column 3, lines 49-50); and

9. wherein all of the printed graphics of the articles have a predetermined association (column 7, lines 8-10 and lines 19-21; column 10, lines 33-34; column 3, lines 19-30);

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10. wherein the backsheet of each of the absorbent articles comprises a sheet of material 66 extending from the first waist region to the second waist region (**claim 30**); a film material 66 (column 10, lines 42-45 and lines 66-67) having a body facing surface and a garment facing surface (**claim 1**), and wherein each printed graphic is printed directly on the sheet of material (**claim 30**); on the garment facing surface of the film material (**claim 1**) (column 10, lines 66-67; column 3, lines 19-30); and

11. wherein the backsheet of each of the absorbent articles further comprises a nonwoven material joined with the garment facing surface of the film material (column 3, lines 45-49; column 11, lines 1-5), and wherein the printed graphic is visible through the nonwoven material (fig. 3; column 7, lines 6-24); and

12. wherein the predetermined association includes a common theme (column 7, lines 6-24).

13. Brandon discloses the claimed invention except for the film is a microporous film.

Brandon provides motivation for the graphics to be printed directly on the film comprising the backsheet and at column 3, lines 31-32, provides motivation for areas of "breathability" on the diaper article. At column 5, lines 50-54, Yeo provides motivation to provide breathable film for the backsheet layer and teaches such films are well known in the art by forming microporous film, and further teaches at column 8, lines 44-48 that it is preferable to print directly on microporous film surfaces because they are smoother than non-woven surfaces and therefore permits greater print pattern definition. As best depicted in Figure 1, Yeo teaches a diaper 20 backsheet 40 comprising a microporous film (c. 5, ll. 49-50) with graphics printed directly on the garment facing surface of the film and the backsheet 10 further comprises a nonwoven material 12 joined with the film and the graphic is visible through the nonwoven (c. 4, ll. 22-24).

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14. Therefore it would have been obvious to one having ordinary skill in the art at the time the invention was made to utilize microporous film for the backsheet film of Brandon as taught by Yeo since Yeo states, at c. 8, ll. 45-47 and at c. 4, ll. 26-27, that the advantage of forming the backsheet with this design is that the microporous film provides a smooth surface to support multi-colored printed graphics and the nonwoven protects the graphic from abrasion and provides a more cloth-like look and feel to the outer surface of the diaper.

15. Brandon discloses the claimed invention except for the product comprises a package and at least n absorbent articles are contained in the package, wherein n is greater than 10, the printed graphic of each of the n absorbent articles is different from the graphic of each of the remaining articles. Brandon, at column 7, lines 8-10 and lines 19-21; column 10, lines 33-34; column 3, lines 19-30, discloses the graphics can be different and discloses many selections of different graphics, thus providing motivation for different graphics.

16. As best depicted in Figure 1, Pargass teaches products comprising a package of at least n absorbent articles wherein n is greater than 10 (column 5, lines 1-5), the articles comprising backsheets comprising films and nonwoven and graphics 21 printed directly on the films comprising the backsheet (column 7, lines 1-15) and the printed graphic of each of the n absorbent articles is different from the graphics of each of the remaining articles, see Abstract; see also column 5, lines 2-5 teaching that the package can contain repeating graphics, thus Pargass teaches that the package can contain articles where each printed graphic is different from the graphics on the remaining articles and can also comprise repeating graphics as desired by the packager of the articles. See also column 2, lines 9-13, teaching that printed graphics having predetermined associations are known in the art.

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17. Therefore it would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the article in packages and with graphics that are different from each other or repeating since Pargass teaches that how to package the graphics and what the content of the graphics are is purely a matter of choice, when there is a variety of possible selections as to how to package the graphics it means that the designer can choose any selection of graphics in packages that he wants.

18. With respect to the limitation that the graphics on the articles are different from each other, the examiner notes that this limitation is drawn to the content of the graphics and thus is drawn to the content of printed matter.

19. With respect to printed matter, the critical question is whether any new and unobvious relationship functional relationship exists between the printed graphic and the substrate, as per MPEP § 2112.01, III. Here, both the instant and the prior art graphics are printed on microporous film with nonwoven material comprising the outer cover of the article and the printed graphic is visible through the nonwoven. Outer covers are known in the art to comprise laminates of films and nonwovens in multiple layers, and therefore the claimed graphics do not define any new and unobvious functional relationship between the printed matter and the substrate. Therefore the prior art anticipates the claimed limitation in accordance with § MPEP 2112.01, III, as reproduced *infra*.

### **III. PRODUCT CLAIMS – NONFUNCTIONAL PRINTED MATTER DOES NOT DISTINGUISH CLAIMED PRODUCT FROM OTHERWISE IDENTICAL PRIOR ART PRODUCT**

Where the only difference between a prior art product and a claimed product is printed matter that is not functionally related to the product, the content of the printed matter

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will not distinguish the claimed product from the prior art. *In re Ngai*, \*\*>367 F.3d 1336, 1339, 70 USPQ2d 1862, 1864 (Fed. Cir. 2004)< (Claim at issue was a kit requiring instructions and a buffer agent. The Federal Circuit held that the claim was anticipated by a prior art reference that taught a kit that included instructions and a buffer agent, even though the content of the instructions differed.). See also *In re Gulack*, 703 F.2d 1381, 1385-86, 217 USPQ 401, 404 (Fed. Cir. 1983)("Where the printed matter is not functionally related to the substrate, the printed matter will not distinguish the invention from the prior art in terms of patentability .... [T]he critical question is whether there exists any new and unobvious functional relationship between the printed matter and the substrate."). MPEP § 2112.01, III.

20. It is well known in the packaging art to provide packaging elements with ornamental graphical and product information to induce potential consumer interest. Therefore the selection of graphics would have been within the level of ordinary skill and obvious for the reason of providing advertisement, identification or information about the product or ornamental graphics to induce consumer interest in the article. Therefore the theme, i.e. content of the graphics does not lend additional patentable weight because if articles were patented based on differences in graphics, multiple patents could issue indefinitely for the same article by simply changing the content of the graphic.

21. **With respect to claim 9**, as best depicted in Figures 1-4, Brandon discloses the common theme include cartoon characters, transportation means, animals and seasonal themes; the examiner notes that this limitation is drawn to the content of the graphics and thus are the content of printed matter, see paragraphs 19-20 supra with respect to the manner in which the content of printed matter are examined in accordance with MPEP § 2112.01, III.



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22. **With respect to claim 11**, Brandon discloses the claimed invention except for n is selected from 11 to 120. Pargass teaches n is selected from 11 to 120 (column 5, lines 4-5).

23. The examiner notes that selecting the number of articles to include in a package is a mental determination, i.e. the result of a mental process; however, mental processes or processes of human thinking are not patentable even if they have practical application. By way of example, if there were 121 or 122 articles in the package instead of 120 as claimed, a separate patent would not issue for the package containing 121 articles, therefore the number of articles in the package does not lend additional patentable weight.

24. In light of the well known practice of packaging items in a manner most convenient for a purchaser, providing articles to the purchaser in one package as opposed to two packages or three packages is not a novel or patentable feature, therefore the single package or two packages limitation does not lend additional patentable weight and is an obvious modification. *Ormco Corporations and Allessse Orthodontic Appliances, Inc. v Align Technology, Inc.* (Fed. Cir. 05-1426, 8/30/2006).

25. **With respect to claims 22 and 32**, Brandon discloses the claimed invention except for expressly disclosing that each of the printed graphics is an inkjet printed graphic. Brandon discloses the graphics are printed, thus providing motivation for printing the graphics but remains silent on the method of printing. Yeo, at column 8, lines 66-67 and column 9, lines 5-10, provides motivation for inkjet printing graphics for absorbent articles. Therefore it would have been obvious to one having ordinary skill in the art at the time the invention was made to print the graphics of Brandon by inkjet printing as taught by Yeo since Yeo states, at column 8, lines 66-67 and column 9, lines 5-10, that the advantage of using inkjet printing is that the

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process can handle multi-color printing and can print directly on a microporous film with no fouling of equipment and provides bright colors and sharp patterns.

26. **With respect to claims 23 and 24**, Brandon discloses the claimed invention except for microporous film. Brandon discloses the sheet of material extending from the first to second waist region is film and the graphic is printed directly on the garment facing surface of the film (**claim 23**), thus providing motivation for such; and discloses a nonwoven material joined with the garment facing surface of the film and the printed graphic is visible through the material (**claim 24**), thus providing motivation for such. As best depicted in Figures 2 and 3, Yeo teaches microporous film 14 and the graphics (fig. 3) printed directly thereon, a nonwoven material 12 joined thereto and the graphic is visible through the material 12 (column 4, lines 20-30).

27. Therefore it would have been obvious to one having ordinary skill in the art at the time the invention was made to form the article of Brandon as taught by Yeo since Yeo states, at column 4, lines 21-30, that the advantage of using microporous film to print graphics upon is that the film surfaces provides colorful graphics which are visually appealing because microporous films provides smooth surfaces to support multi-colored printed graphics and the nonwoven protects the graphic from abrasion and provides a more cloth-like look and feel to the outer surface of the diaper.

28. Claims 33 and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Brandon in view of Yeo and Pargass and further in view of Stavroulov (WO 00/13632).

29. **With respect to claims 33 and 34**, the combination of Brandon, Yeo and Pargass disclose the claimed invention except for the articles stacked in the package in a randomly

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selected order. The combination discloses the predetermined association includes a common theme, see claims 1 and 30 *supra*, thus providing motivation for such.

30. The examiner notes that the limitations of a predetermined association and a common theme among the graphics is not a structural limitation of the article and therefore does not serve to further limit the article.

31. The dictionary definition of "predetermined" is "to decide something at an earlier time" (Cambridge International Dictionary of English). The dictionary definition of "association" is, *inter alia*: something linked in memory or imagination with a thing or person; the process of forming mental connections or bonds between sensations, ideas, or memories (Merriam-Webster Online Dictionary). The dictionary definition of "theme" is "a subject or topic of discourse or of artistic representation; a specific and distinctive quality, characteristic or concern (Merriam-Webster Online Dictionary). Therefore the limitation of a predetermined association including a common theme is not a structural limitation of the article but rather is drawn to a mental process and therefore does not lend additional patentable weight.

32. With respect to the limitation that the articles are stacked in the package in a randomly selected order, the selected order in which a seller of the articles places the articles in the package is not a structural limitation of the product but is the result of a mental decision on how the package the articles in a manner attractive to a consumer. Deciding to package the diapers in randomly selected orders or non-randomly selected orders is the result of a mental process, i.e. selecting how to distribute and sell the diapers is a marketing strategy of offering for sale products packaged in a manner which makes the purchase thereof attractive to a consumer.

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33. By way of non-limiting examples, the diapers in the package can be taken out of the package and rearranged in an entirely different order that is non-random or random and the diapers can be then replaced into the package; each diaper can also be provided in a single package, or provided unpackaged as promotional samples. The structural elements of the diapers do not change if their order in the package is rearranged differently thus the order in which the diapers are placed in the package does not affect the diaper structure. Therefore this limitation does not lend additional patentable weight.

34. If products were patented based on simply changing the order in which they are placed in a package, multiple patents could issue indefinitely for the same product merely by placing them in a package in a different order. Additionally, the articles of Brandon are fully capable of being placed in a package in a randomly selected order.

35. In the alternative, the combination of Brandon, Yeo and Pargass disclose the claimed invention except for the printed graphics are printed in a randomly selected order, the combination discloses the articles placed in the package in a variety of orders, thus providing motivation to package the articles in a variety of orders (Pargass, column 5, lines 1-5).

36. The dictionary definition of "random":

37. Main Entry: **·ran·dom**

38. Pronunciation: \ˈran-dəm\

39. Function: *noun*

40. Etymology: Middle English, succession, surge, from Anglo-French *randun*, from Old French *randir* to run, of Germanic origin; akin to Old High German *rinnan* to run — more at RUN

41. Date: 1561

: a haphazard course

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— **at random** : without definite aim, direction, rule, or method <subjects chosen *at random*>

42. (source: Merriam Webster Online Dictionary).

43. Stavrulov teaches absorbent articles comprising graphics wherein the graphics are printed in a randomly selected order. Stavrulov teaches that the graphics can be either in a randomly selected order or non-randomly selected order as desired by the designer depending on the intended end use, i.e. such as graphics for informational, educational, and instructive or for entertainment and amusement, and the number of articles being provided to the consumer. Stavrulov teaches non-random graphics such as: graphics and text linked by common subjects, ideas, a series of pictures linked by a common plot (page 5, page 9), and consecutive stages from Disney cartoons (page 11), i.e. a story told in sequential order which is not random.

44. Stavrulov teaches random graphics such as fragments of text and titles of literary works (page 2); interesting trivia facts and observations; advice given – advice given would necessarily be random since the particular advice provided in any given graphic would not be related in any way to any particular situation the consumer may need to be advised in at the moment they encounter any particular graphic (page 5); puzzles and rebuses, conundrums, patterns – patterns can be ordered patterns or random patterns, and can be abstract meaningless patterns; ornaments (page 5); independent images, which suggests images not associated with each other in any way and thus random (page 8); graphics of automobile models, breeds of trees, architectural monuments, textual fragments (page 9); unequal ornaments and riddles with a degree of dissimilarity and which do not coincide with each other (page 11).

45. Stavrulov teaches that the type of graphics and their random or non-random nature depends on the prospective purpose and kinds of households the graphics are intended to attract.

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Stavrulov further teaches that these graphics can have a positive effect of the emotions of a consumer to attract the consumer to purchase and enjoy the articles (page 4) and that if the graphics become familiar and routine, the attractiveness to the consumer may diminish with time (page 3), thus providing motivation for a degree of randomness to keep the articles and graphics exciting for the purchasers thereof.

46. Therefore, in view of the teachings of Stavrulov, it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide the graphics of Brandon, Yeo and Pargass in either randomly selected order or in non-randomly selected order in order to provide the benefits Stavrulov discloses. The examiner notes that when there is an almost limitless variety of possible graphics and orders to choose from, the choices illustrate that the graphics provided is purely a matter of choice; when there is a variety of possible choices, it means that the designer can choose any graphics in any order that he wants.

#### ***Response to Arguments***

47. Applicant's arguments filed 08 July 2010 have been fully considered but they are not persuasive.

48. With respect to the order that the articles are placed in the package, Applicant argues that the order in which the seller decides to place the articles are in the package is a structural limitation, and that the claims therefore recite the structural limitation that define that the random order is a structural limitation, and that the Office action assertion that the order is the result of a mental decision is based upon subjective reasoning as to why a patent should or should not be granted as opposed to an objective rationale based on law (Remarks, page 13 of 14).

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49. However, Applicant has provided no arguments or evidence as to how the orders of the articles in the package are a structural limitation, Applicant merely states that it is a structural limitation and therefore the claims recite a structural limitation, but Applicant provides no reasons or arguments for this conclusion.

50. With respect to the Office action based on subjective reasoning, it is noted that paragraphs 30-46 *supra* detail that the prior art discloses random orders, and thus this feature is known in the art and therefore cannot be the point of novelty; at paragraph 24 *supra* that packaging articles to consumers in manners convenient and thus attractive to consumers has been held by the courts to be well known practice and obvious modifications and do not lend additional patentable weight; that the dictionary definitions of the claimed limitations are mental processes and mental processes are not patentable even if the mental processes have practical application; and that the analysis of claims 1 and 30 *supra* details that the structural elements / components of the article are known in the prior art and with no change in the respective functions of the elements as they perform the functions that they are known to perform with predictable results; and that the content of the graphics is examined in accordance with the MPEP with respect to the content of printed matter.

51. Thus the analysis of the claimed limitations is not based upon subjective reasoning but is based on the teachings of the prior art, the holdings of law, and proper examination in accordance with the MPEP.

52. Therefore the examiner respectfully traverses Applicants' arguments with respect to the rejection of the claims and maintains the rejections of the rejected claims.

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53. Applicant's arguments with respect to claims 1, 9, 22-24, 30 and 32-34 have been considered but are moot in view of the new ground(s) of rejection.

***Conclusion***

54. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

55. Ungpiyakul et al (US 5286543 A) discloses reference marks for printing graphics directly on films and film / nonwoven laminates comprising backsheets.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ginger T. Chapman whose telephone number is (571)272-4934. The examiner can normally be reached on Monday through Friday 9:30 a.m. to 6:00 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Tatyana Zalukaeva can be reached on (571) 272-1115. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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Examiner, Art Unit 3761

08/11/10

/Tatyana Zalukaeva/

Supervisory Patent Examiner, Art Unit 3761